Supreme Court, U.S.
FILED
JUN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

v.

MAGNO J. ORTEGA,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE SUPPORTING RESPONDENT

RICHARD KIRSCHNER
Counsel of Record
CRAIG BECKER
KIRSCHNER, WEINBERG & DEMPSEY
1615 L Street, N.W., #1360
Washington, D.C. 20036
(202) 775-5900
Counsel for American Federation of State, County and Municipal Employees, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Ortega Had A Reasonable Expectation Of Privacy In His Office	4
A. Occasional, Consensual, And Limited Intrusions By Fellow Employees Did Not Deprive Ortega Of His Reasonable Expectation Of Privacy	7
B. Governmental Needs Cannot Deprive Ortega Of His Reasonable Expectation Of Privacy	10
C. Ortega's Reasonable Expectation Was That Neither The Police Nor His Employer Or Its Security Force Would Invade His Privacy	11
D. Government Offices Should Not Be Categorically Excluded From Fourth Amendment Protection	13
II. The Searches Of Ortega's Office Were Unreasonable	15
A. The Searches Were Per Se Unreasonable Because They Were Conducted Without A Warrant	15
B. The Searches Violated All Standards Of Reasonableness Yet Established Under The Fourth Amendment	21
C. The Standard Proposed By Petitioners Would Wholly Deprive Public Employees Of Fourth Amendment Protection	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases: Page

Arkansas v. Sanders, 442 U.S. 753 (1979) 15
Berger v. New York, 388 U.S. 41 (1967) 4, 15
Bishop v. Wood, 426 U.S. 341 (1976) 21
Board of Regents v. Roth, 408 U.S. 564 (1972) 18
Burdeau v. McDowell, 256 U.S. 465 (1921) 13
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961) .. 19
Camara v. Municipal Court, 387 U.S. 523 (1967) 12, 13, 15, 16
Chapman v. United States, 365 U.S. 610 (1961) 5, 9
Chenkin v. Bellevue Hospital Center, 479 F.Supp. 207 (S.D.N.Y. 1979) 7
Chimel v. California, 395 U.S. 752 (1969) 15
Chocallo v. Bureau of Hearings and Appeals, SSA, 548 F.Supp. 1349 (E.D. Pa. 1982) 7, 20
Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985) 18
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 18
Connick v. Myers, 461 U.S. 138 (1983) 18
Davis v. United States, 328 U.S. 582 (1946) 7, 22
Donovan v. Dewey, 452 U.S. 594 (1981) 4, 13
Ex Parte Jackson, 96 U.S. 727 (1877) 19
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 4, 15
Gillard v. Schmidt, 579 F.2d 825 (3d Cir. 1978) 5, 6
Givhan v. Western Line Consolidated Schools, 439 U.S. 410 (1974) 18
Hoffa v. United States, 385 U.S. 293 (1966) 4, 8
Hudson v. Palmer, 104 S.Ct. 3194 (1984) 14, 17
Jafree v. Scott, 372 F.Supp. 264 (N.D. Ill. 1974) 7
Johnson v. United States, 333 U.S. 10 (1984) 16
Jones v. United States, 362 U.S. 257 (1960) 5
Katz v. United States, 389 U.S. 347 (1967) 4, 5, 6, 14, 15
Lanza v. New York, 370 U.S. 139 (1962) 15
Lewis v. United States, 385 U.S. 206 (1966) 8
Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) .. 8

TABLE OF AUTHORITIES—Continued

	Page
Mancusi v. DeForte, 392 U.S. 364 (1968)	4, 5, 8, 10, 15
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)	4, 13, 15, 19
Michigan v. Tyler, 436 U.S. 499 (1978)	13
Mincey v. Arizona, 437 U.S. 385 (1978)	15, 16, 21, 22
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)	18
New Jersey v. T.L.O., 105 S.Ct. 733 (1985)	13, 14, 16, 22, 24
Oliver v. United States, 104 S.Ct. 1735 (1984)	4, 5
Pickering v. Board of Education, 391 U.S. 563 (1968)	18
Rakas v. Illinois, 439 U.S. 128 (1978)	5
Rawlings v. Kentucky, 448 U.S. 98 (1980)	5, 6
Schmerber v. California, 384 U.S. 757 (1966)	11
See v. Seattle, 387 U.S. 541 (1967)	4, 13
Shaffer v. Field, 339 F.Supp. 997 (E.D. Pa. 1967)	11
Silverman v. United States, 365 U.S. 505 (1961)	4
Smith v. Maryland, 442 U.S. 735 (1979)	7
Stanley v. Illinois, 405 U.S. 645 (1972)	17
Stoner v. California, 376 U.S. 483 (1964)	5, 9
Terry v. Ohio, 392 U.S. 1 (1968)	8, 21, 22
United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951)	10
United States v. Bunkers, 521 F.2d 1217 (9th Cir. 1975)	11
United States v. Chadwick, 433 U.S. 1 (1977)	5, 6, 15, 17
United States v. Collins, 349 F.2d 863 (2d Cir. 1965)	11
United States v. Donato, 269 F.Supp. 921 (E.D. Pa. 1967)	11
United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972)	10
United States v. Jeffers, 342 U.S. 48 (1951)	15
United States v. Kahan, 350 F.Supp. 784 (S.D.N.Y. 1972), *aff'd*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974)	10, 11
United States v. Matlock, 415 U.S. 164 (1974)	9

TABLE OF AUTHORITIES—Continued

	Page
United States v. *McIntyre*, 582 F.2d 1221 (9th Cir. 1978)	11
United States v. Place, 462 U.S. 696 (1983)	16
United States v. Ross, 456 U.S. 798 (1982)	15
United States v. Salvucci, 448 U.S. 83 (1980)	5
United States v. Sanders, 568 F.2d 1175 (9th Cir. 1975)	11
United States v. Speights, 557 F.2d 362 (3d Cir. 1977)	5
Walter v. United States, 447 U.S. 649 (1980)	19
Warden v. Hayden, 387 U.S. 294 (1967)	5, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-530

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

v.

MAGNO J. ORTEGA,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE AMICUS CURIAE

The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) is an association of over one million employees of state, county and municipal governments. The decision in this case will affect the right of all AFSCME's members to privacy in their workplaces.

AFSCME submits this brief with the consent of the parties pursuant to the Rules of the Court.

STATEMENT OF THE CASE

Respondent Magno J. Ortega is a physician and psychiatrist and was at all times material to this case Chief of Professional Education at Napa State Hospital. Petitioner Dennis M. O'Connor was the Hospital's Executive Director; Petitioner Richard Friday, the Hospital Administrator; and Petitioner Dorothy Owen, the Hospital's Personnel Officer.

During the summer of 1981, O'Connor began an investigation of Ortega based on several charges of misconduct. O'Connor subsequently placed Ortega on administrative leave. O'Connor appointed a three-person committee to conduct the investigation, including Jim Stratton, a member of the Hospital's police force. As part of the investigation, Petitioners authorized Stratton to enter Ortega's private office in the Hospital and conduct a search of all items in the office, including Ortega's desk and file cabinet.

Ortega had occupied his private office for 17 years. His name was on the door. Ortega kept the office locked when he was not inside and believed he possessed the only key. Prior to the searches at issue, no one had entered the office without Ortega's permission.

Without requesting Ortega's consent, without allowing Ortega to be present, and without first requesting that Ortega produce any item for inspection, Stratton entered Ortega's office on each of more than seven days. On each of these days Stratton spent several hours sifting through the contents of Ortega's office. Petitioners did not segregate or retain any State property found in the office. Rather, after the searches, the contents of the office were placed in boxes and made available to Ortega. The only items retained as a result of the searches were several purely personal items—a photograph of a woman friend, a valentine, and a book of poetry given to Ortega as a gift—which were subsequently used as evidence against Ortega

in an administrative proceeding relating to the termination of his employment.

Ortega filed suit in the United States District Court for the Northern District of California pursuant to 42 U.S.C. § 1983, alleging a violation of his right to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution. Cross-motions for summary judgment were filed and the Court granted summary judgment in favor of the Defendants.

Ortega appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals reversed and directed the trial court to grant partial summary judgment on the question of liability in favor of Ortega. 764 F.2d 703 (9th Cir. 1985).

SUMMARY OF ARGUMENT

Ortega had a reasonable expectation of privacy in his office. Routine entry by fellow employees did not deprive Ortega of this expectation as Ortega reasonably expected all such entries would be preceded by a request and his consent. In addition, the scope of these routine intrusions was not comparable to the repeated, comprehensive, and nonconsensual search of the entire office and its contents. Ortega's reasonable expectation of privacy extended not simply to the police, but also to his employers, who were also state actors, and the internal security force at his employers' direction.

The searches of Ortega's office were unreasonable because they were conducted without a warrant in the absence of exigent circumstances. Moreover, the searches violated any standard of reasonableness because their scope far exceeded the circumstances which allegedly justified their inception.

ARGUMENT

I. Ortega Had A Reasonable Expectation Of Privacy In His Office

Petitioners conducted repeated searches of Ortega's private office, including his desk and file cabinet. There is no question that Ortega had a reasonable expectation of privacy in his private office as well as in the desk and file cabinet located in his office. This Court has held many times that both employers and employees have a reasonable expectation of privacy in their place of work. *See, e.g., Berger v. New York*, 388 U.S. 41, 64 (1967); *Donovan v. Dewey*, 452 U.S. 594, 598 (1981); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977); *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Katz v. United States*, 389 U.S. 347, 352, 359 (1967); *Mancusi v. Deforte*, 392 U.S. 364, 367-69 (1968); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *See v. Seattle*, 387 U.S. 541, 543 (1967); *Silverman v. United States*, 365 U.S. 505, 512 (1961). This Court stated in *Oliver v. United States*, 104 S.Ct. 1735 (1984), "The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is . . . based upon societal expectations that have deep roots in the history of the amendment." *Id.* at 1741 n.8. Even earlier, this Court noted forcefully that "in light of" this history and "this Court's clear holdings to the contrary," the proposition "that business premises are not protected by the Fourth Amendment . . . could not be defended." *G.M. Leasing Corp.*, 429 U.S. at 353.

The fact that Ortega did not own the office does not render his expectation of privacy in the office unreasonable. Title is not a prerequisite to Fourth Amendment protection. This Court has long refused to rest its holdings in this area on the law of property. "[C]apacity to claim the protection of the Amendment depends not upon

a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Mancusi*, 392 U.S. at 368. *See also United States v. Salvucci*, 448 U.S. 83, 91 (1980); *Katz*, 389 U.S. at 353; *Warden v. Hayden*, 387 U.S. 294, 304, 305 (1967); *Chapman v. United States*, 365 U.S. 610, 617 (1961); *Jones v. United States*, 362 U.S. 257, 266 (1960). Tenants, *Chapman*, occupants of hotel rooms, *Stoner v. California*, 376 U.S. 483, 490 (1964), guests, *Jones*, and employees, *Mancusi*, all enjoy the protections of the Fourth Amendment. *See also Gillard v. Schmidt*, 579 F.2d 825, 829 (3d Cir. 1978) (high school guidance counselor had reasonable expectation of privacy in his desk); *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977) (police office had reasonable expectation of privacy in his locker).

Ortega's office was a private office. He did not share it with any other person. His name was on the door and he had occupied the office for seventeen years. J.A. at 14 (Ortega Declaration ¶ 4). Ortega had a right to exclude other people from his office. *See Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); *Rakas v. Illinois*, 439 U.S. 128, 149 (1978). He kept the door locked at all times while he was not in the office and he believed he had the only key. J.A. at 14 (Ortega Declaration ¶ 4); *id.* at 21 (Ciraulo Declaration ¶ 4). No one had entered the office without Ortega's permission during his tenure. *Id.* at 14 (Ortega Declaration ¶ 5).

The activities which a physician might engage in inside such an office are "of a kind in which people should be able to engage without fear of intrusion by private persons or government officials." *Oliver*, 104 S.Ct. at 1748 (Marshall, J., dissenting). *See also Rakas*, 439 U.S. at 153 (1978) (Powell, J., concurring); *United States v. Chadwick*, 433 U.S. 1, 13 (1977); *Katz*, 389 U.S. at 352-53. A doctor might meet with patients, maintain confi-

dential files,[1] work on sensitive research, and store a host of purely personal items in his private office.[2] A doctor certainly has a reasonable expectation that such activities and materials will remain private. *Cf. Gillard*, 579 F.2d at 828 (guidance counselor had "reasonable expectation" that "desk containing psychological profiles and other confidential student records would remain safe from prying eyes").

Ortega did nothing to expose the activities within or the contents of his office to public view. Rather, he "took normal precautions to maintain his privacy." *Rawlings*, 448 U.S. at 106; *Chadwick*, 433 U.S. at 11; *Katz*, 389 U.S. at 352.

---

[1] Petitioner O'Connor admitted that Ortega had private patients, that he could meet them in his office, and that the files of these patients were reviewed during the searches. J.A. at 44-45 (O'Connor Deposition at 60-61).

[2] Ortega identified the following items as among those seized during the searches:

a. purely personal correspondence from friends and family;
b. photographs of friends, acquaintances, and family;
c. medical files and correspondence from private patients unconnected to Napa State Hospital;
d. appointment books and personal notes, as well as official appointments;
e. personal financial records and accounts;
f. a file approximately 18 feet long of IBM cards containing teaching aids and notes;
g. personal souveniers, gifts and presents belonging to plaintiff;
h. copyrighted manuscript.

J.A. at 14 (Ortega Declaration ¶ 21). Several of these items, including a photograph of a woman friend, a valentine, and a book of poetry given to Ortega as a gift, were subsequently used as evidence against Ortega in the removal proceedings. *Id.* at 15 (¶¶ 22-24); II Record Tab 27, Ortega Declaration Exhibits K, K-1, K-2; III Record Tab 30, Stratton Deposition at 61; J.A. at 43 (O'Connor Deposition at 51).

Petitioners did nothing to deprive Ortega of his expectation of privacy.[3] They did not have an explicit policy authorizing search of doctors' offices nor did they routinely conduct such searches.[4]

A. *Occasional, Consensual, And Limited Intrusions By Fellow Employees Did Not Deprive Oretga Of His Reasonable Expectation Of Privacy*

Petitioners argue that Ortega, like any employee, must expect occasional intrusions by his employer or fellow employees "to obtain a file or piece of correspondence, or borrow a paper clip." Brief for Petitioners at 16. But Ortega's reasonable expectation was that even these minimal intrusions would be preceded by a request and his consent. *Cf. Davis v. United States*, 328 U.S. 582, 593 (1946) (demand for government owned ration coupons preceded seizure); *Chocallo v. Bureau of Hearings and Appeals, SSA*, 548 F. Supp. 1349, 1363-64 (E.D. Pa. 1982) (request to relinquish file preceded search).

Moreover, even regular visits of this unintrusive type would not deprive Ortega of his reasonable expectation that his entire office, including his desk and files, would

---

[3] The United States as amicus curiae suggests that it might have been hospital policy to inventory property in the offices of departing employees. Brief of United States at 13 n.* (typescript). At the time of the searches, however, Ortega had not been terminated. Moreover, an employee would certainly reasonably expect that he or she would be present at any such predeparture inventory since its only legitimate purpose would be to prevent the employee from taking any public property. *See, e.g., Jafree v. Scott*, 372 F.Supp. 264, 273-74 (N.D. Ill. 1974).

[4] Moreover, the government cannot, contrary to the assertion of the United States as amicus curiae, Brief of United States at 13 n.* (typescript), adopt such a policy or practice and thereby simply deprive employees of their expectation of privacy. *See Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979); *Chenkin v. Bellevue Hospital Center*, 479 F.Supp. 207, 211 (S.D. N.Y. 1979).

not be searched. The scope of a search is critical to its constitutionality under the Fourth Amendment. "This court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 17-18 (1968) (and cases cited therein). Even if Ortega could not reasonably expect that fellow employees would never enter his office, he could legitimately expect that they would not sort through his desk and files.

This Court's holding in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), and its dicta in *Lewis v. United States*, 385 U.S. 206 (1966), support the proposition that a right of access does not entail the right to conduct a general search. In *Lo-Ji Sales*, this Court held that although government agents could enter a retail establishment in the same manner as members of the public, entry as customers did not justify a search beyond what a customer "would ordinarily see." *Id.*, 442 U.S. at 329. In *Lewis*, this Court cautioned:

> A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials.

Id., 385 U.S. at 211. Similarly, in *Mancusi*, Justice White found that a union official might have a reasonable expectation of privacy in his "private desk" even if he could not have such an expectation in an entire "office shared with other officers and employees." *Id.*, 392 U.S. at 377 (White, J., dissenting). "[W]hen [an individual] put[s] something in his filing cabinet [or] in his desk drawer . . . he has the right to know it will be secure from an unreasonable search." *Hoffa*, 385 U.S. at 301.

This Court's rulings concerning third-parties' consent to searches also support the proposition that an employer's limited right of access to an employee's private office does not deprive the employee of all expectation of privacy in the office. In these cases, this Court has held that although a landlord or employer may have a property interest in and limited common authority over premises, the landlord's or employer's consent to search the premises cannot effectively waive the privacy interest of a tenant or employee. In *Chapman*, 365 U.S. 610, this Court rejected the proposition that a landlord could authorize entry into a tenant's apartment. This Court held that the landlord's property interest did not eliminate the tenant's privacy interest in the apartment. *See also Stoner*, 376 U.S. 483 (hotel guest).

In *United States v. Matlock*, 415 U.S. 164 (1974), this Court specified the nature of the "common authority" over premises which must be held by a third-party to render his consent to the search of such premises valid against their occupant. This Court again rejected a "mere property interest" as inadequate:

> The authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7.

An employer does not have the requisite common authority over an employee's private office. In this case, there was no "mutual use." The office was used exclusively by Ortega. Nor was there "joint access or control for most purposes." Access by others was only with Ortega's consent and Ortega controlled his office for all purposes. Based on this Court's precedent, several lower

courts have found employers' consent to the search of their employees' offices inadequate. *See United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951); *United States v. Kahan*, 350 F.Supp. 784, 794-95 (S.D.N.Y. 1972), *aff'd*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974). *Cf. United States v. Gargiso*, 456 F.2d 584, 586-87 (2d Cir. 1972) (employer's consent to search storage area valid when employee did not have exclusive access to area).

In this case, the consenting party and the searching party are merged into one. But this merging of roles does not vest the state with any greater authority than it would have upon consent of a private employer. Despite Petitioners' interest in Ortega's office as his employer, Ortega retained an independent and reasonable expectation of privacy in his office.

This Court's dicta in *Mancusi* is not to the contrary. In that case, this Court held that a union officer had standing to challenge search of a common union office and that the officer had a reasonable expectation of privacy in the office. 392 U.S. at 369-70. In so holding, this Court stated that the officer was "entitled to expect . . . that records would not be taken [from the office] except with his permission or that of his union superiors." *Id.* at 369. In adding the final clause to this sentence, this Court no doubt contemplated union superiors obtaining a commonly used and specific record or set of records from the office. This Court certainly did not contemplate a general and total search of an employee's private office, desk, and file cabinet.

B. *Governmental Needs Cannot Deprive Ortega Of His Reasonable Expectation Of Privacy*

Petitioners argue that society is not prepared to recognize a public employee's expectation of privacy in his or her office because recognition of such an expectation would impair the efficiency of the civil service. This type

of argument has traditionally been allowed no place under this prong of Fourth Amendment analysis. To recognize such an argument here would be to duplicate the analysis which must then be conducted again to determine if the search was "unreasonable." For example, exigent circumstances may render a warrantless search reasonable, *see, e.g., Warden*, 387 U.S. at 298-300 (hot pursuit); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (imminent destruction of evidence), but they do not deprive the subject of such a search of his or her reasonable expectation of privacy. Ortega's expectation is in no way unreasonable or illegitimate even if the search was critical to a legitimate governmental purpose.[5]

C. *Ortega's Reasonable Expectation Was That Neither The Police Nor His Employer Or Its Security Force Would Invade His Privacy*

Petitioners also argue that although Ortega may have had a reasonable expectation of privacy vis-a-vis the police, he did not have such an expectation vis-a-vis his superiors and the security force at their direction.[6] This

---

[5] As demonstrated *infra* at 19-21, the searches were not necessary to the functioning of the hospital.

[6] Even if material, the distinction between the state as police and the state as employer cannot always be maintained. Many large public employers, like the hospital at issue, have internal security forces. Search and seizure by such internal security forces, and even by the employer itself, often leads to criminal prosecution in addition to administrative action. *See, e.g., United States v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978); *United States v. Sanders*, 568 F.2d 1175 (5th Cir. 1978); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975); *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965); *United States v. Kahan*, 350 F.Supp. 784 (S.D. N.Y. 1972); *Shaffer v. Field*, 339 F.Supp. 997 (C.D. Cal. 1972); *United States v. Donato*, 269 F.Supp. 921 (E.D. Pa. 1967).

In this case, a "hospital police officer" was the person who conducted the searches. J.A. at 33-34, 40 (O'Connor Deposition at 27, 47); *id.* at 48 (Friday Deposition at 18). Further, Petitioners

argument is also misplaced. Ortega's expectation of privacy extended to all intruders. Because Ortega's expectation was reasonable, no state actor could invade his privacy except in compliance with Fourth Amendment standards.

Petitioners' contentions that public employees cannot legitimately expect to keep job related materials private from their employer and that public employees have no right to maintain purely personal items in their offices are incorrect. A professor may legitimately expect that his unfinished manuscript will not be reviewed by university administrators or colleagues without his permission. A doctor may legitimately expect and indeed has a professional duty to ensure that his patients' confidential files will not be scrutinized by anyone not party to doctor-patient relationship, including hospital administrators. Moreover, society, as well as most public employers, are certainly prepared to recognize that employees may maintain some purely personal items in their offices and, on occasion, use their offices for purely personal purposes such as a telephone call to a spouse. Recognition of such personal use of public space has not transformed government offices into "citadels of inefficiency," but instead made them humane and, indeed, typical worksites.

This Court has never conditioned the protection of the Fourth Amendment on the purposes of a search or the identity of the searchers. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court rejected the proposition that the Fourth Amendment does not protect equally against searches by criminal and civil authorities: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth

---

admit that the search was prompted by "Dr. O'Connor['s] . . . concern[] that a theft of state property may have occurred." Brief of Petitioners at 4. If this concern had proved justified, the fruits of the search would certainly have led to criminal prosecution and, perhaps, conviction.

Amendment only when the individual is suspected of criminal behavior." *Id.* at 530. *See also Donovan*, 452 U.S. at 599; *Michigan v. Tyler*, 436 U.S. 499, 504-05, 506 (1978); *See*, 387 U.S. 541. This Court has recognized that "the Fourth Amendment prohibition against warrantless searches protects against warrantless intrusion during civil as well as criminal investigations . . . . The reason is found in the 'basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Marshall v. Barlow's, Inc.*, 437 U.S. 307, 312 (1978) (quoting *Camara*, 387 U.S. at 528). This Court has found that searches conducted by officials who are "health, fire, or building inspectors" must satisfy the Fourth Amendment even though "[t]heir purpose may be to abate a suspected public nuisance, or simply to perform a routine periodic inspection." *Tyler*, 436 U.S. at 504. The reason underlying these holdings is obvious: "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall*, 436 U.S. at 312. The Fourth Amendment is thus not simply a restraint on police action, but "[r]ather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority.'" *New Jersey v. T.L.O.*, 105 S.Ct. 733, 740 (1985) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)).

D. *Government Offices Should Not Be Categorically Excluded From Fourth Amendment Protection*

Petitioners essentially urge this Court to categorically exclude government offices from the protection of the Fourth Amendment by finding that public employees cannot under any circumstances have a reasonable expectation of privacy in their offices. To adopt this sug-

gestion would be to adopt the form of analysis rejected in *Katz*. This Court held in *Katz* that there are no constitutionally protected or constitutionally unprotected areas, "For the Fourth Amendment protects people, not places." *Id.*, 389 U.S. at 351. "[W]hat [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.

Since *Katz*, this Court has been extraordinarily reluctant to find any area outside the bounds of the Fourth Amendment. This Court has advised "caution in approaching claims that the Fourth Amendment is inapplicable in a given context." *Hudson v. Palmer*, 104 S.Ct. 3194, 3200 (1984). In fact, since *Katz*, this Court has found only one area to be so unprotected—prison cells. *Hudson*, 104 S.Ct. at 3200. Adoption of Petitioners' position would equate the office of a public servant with the cell of a convicted criminal. No amount of evidence of the administrative convenience served by such searches could justify this result. Last term in *T.L.O.*, 105 S.Ct. 733, this Court held:

> Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright*, 430 U.S., at 669. . . . We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Id. at 742.

This Court should likewise refuse to equate government offices with prison cells. In fact, this Court in *Hudson*

expressly stated that "[a] prison 'shares none of the attributes of privacy of . . . an office.'" *Id.* at 3201 (quoting *Lanza v. New York*, 370 U.S. 139, 143-44 (1962)).

Ortega displayed a subjective expectation of privacy in his office and this expectation is one that society is prepared to recognize as reasonable.

II. The Searches Of Ortega's Office Were Unreasonable

The Fourth Amendment prohibits only unreasonable searches and seizures. The searches of Ortega's office were unreasonable.

A. The Searches Were Per Se Unreasonable Because They Were Conducted Without A Warrant

This Court has long held that warrantless searches are *per se* unreasonable. This rule has most often been applied to searches of homes, but it has also been applied "in a variety of other settings," *Chadwick*, 433 U.S. at 10, including offices. *See Marshall*, 436 U.S. at 312; *G.M. Leasing*, 429 U.S. at 355; *Mancusi*, 392 U.S. at 370-71; *Berger*, 388 U.S. at 54-64; *Camara*, 387 U.S. at 543. This rule applies to all cases not falling into "a few specifically delineated and well- recognized exceptions." *T.L.O.*, 105 S.Ct. at 750-51 (Brennan, J., dissenting). *See also United States v. Ross*, 456 U.S. 798, 825 (1982); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz*, 389 U.S. at 357. This case does not fall into any of the exceptions to the warrant requirement.

Petitioners argue that a warrant should not be required in this context because such a requirement would impair the efficiency of the civil service. In assessing this claim, it should be noted that the party seeking an exemption from the warrant requirement bears the burden "to show the need for it." *Arkansas v. Sanders*, 442 U.S. 753, 760 (1979) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)). *See also Chimel v. California*, 395 U.S. 752, 762 (1969); *Katz*, 389 U.S. at 357.

Petitioners' argument is fundamentally misconceived. In *Camara*, this Court firmly rejected an identical argument:

> The final justification suggested for warrantless administrative searches is that the public interest demands such a rule. . . . [W]e think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. . . . It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.

387 U.S. at 533.

Petiitoners presented no evidence suggesting that under the particular facts of this case they could not have obtained a warrant for the searches of Ortega's office. "[S]pecial governmental needs sufficient to overcome the warrant requirement flow from exigency—that is, press of time that makes obtaining a warrant either impossible or hopelessly infeasible." *T.L.O.*, 105 S.Ct. at 751 (Brennan, J., dissenting). *See also United States v. Place*, 462 U.S. 696, 701-02 (1983); *Mincey*, 437 U.S. at 393-94 (1978); *Johnson v. United States*, 333 U.S. 10, 15 (1984).

No exigency of any kind existed in this case. Ortega had been excluded from the office. All government prop-

erty was thus secure within the office. After the property was thus "safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *Chadwick*, 433 U.S. at 13. There was no urgent need to secure any of the property in the office. The searches were conducted piecemeal over a period of more than a week. III Record Tab 30, Stratton Deposition at 52-53. Moreover, Petitioners admit that *all* the property removed from the office was simply "boxed" and placed in storage for Ortega to retrieve. Brief for Petitioners at 8 n.5.

At worst, a warrant requirement would have caused Petitioners minor inconvenience. Such inconvenience cannot outweigh Ortega's constitutional right. Such a result would subvert "the purpose of a written Constitution and its Bill of Rights."

> That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental officials or legislative majorities. The Fourth Amendment is part of that fundamental law; it represents a value judgment that unjustified search and seizure so greatly threatens individual liberty that it must be forever condemned as a matter of constitutional principle.

Hudson, 104 S. Ct. at 3216 (Stevens, J., concurring in part and dissenting in part) (footnote omitted). In applying the Fourteenth Amendment's due process clause to a public employer, this Court held:

> Certainly, the boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives. . . . But, as the Court stated in *Stanley v. Illinois*, [405 U.S. 645], 656 [1972]:
>
> > "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general . . . that they were designed to protect the fragile

> values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praisewo[illegible] government officials no less, and perhaps [illegible]e, than mediocre ones." (Footnote omitted.)

> While [one procedure] might be easier for the school boards . . ., administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards, to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 646-47 (1974) (footnotes omitted).

Petitioners argue that a public employer must enjoy all the power and authority over its employees enjoyed by a private employer: "Where the government employer does not act in aid of a pending criminal proceeding, it must have the same right to oversee its employees and investigate job performance as any private employer would have." Brief for Petitioners at 13. But Petitioners' argument overlooks the impediment of the Constitution. The Constitution does not limit the actions of private employers, but it does limit the actions of public employers. A private employer can fire an employee in retaliation against the employee's exercise of his right to speak or associate, a public employer cannot. *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Consolidated Schools*, 439 U.S. 410 (1974); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968). A private employer can fire an employee without affording him any type of hearing, a public employer cannot. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Likewise, a private employer can search an employee's

office, but a public employer cannot.[7] In each of these areas, this Court has held "that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 897-98 (1961).

Petitioners assert that the authority to search an employee's office for any reason and at any time is critical to their role as employer. But requiring that state officials obtain a warrant prior to a search of the type at issue would not unduly hamper public administration. Contrary to Petitioners' assertions, these searches were not part of the normal, everyday administration of the hospital. The issue here is not whether the boss or a fellow employee can scan an office in search of a lost file or borrow a paper clip. The searches at issue were both extraordinarily intrusive and not a normal part of the operation of the hospital. In the normal administration of an office, the boss or a fellow employee would not enter another employee's private office without requesting and receiving consent. A warrant requirement would not restrict these interactions because in almost all instances the employee, like the businessman in *Marshall*, "can be expected in normal course to consent to inspection without warrant." *Id.*, 436 U.S. at 316. In this case, there is no evidence in the record suggesting that Ortega would not have consented to produce whatever Petitioners wished to inspect. In fact, Petitioner Friday admitted that there was no reason why Ortega was not permitted

---

[7] The Fourth Amendment limits the means by which the government, in contrast to a private actor, can carry out other non-police functions as well. *Compare Ex Parte Jackson*, 96 U.S. 727 (1877) (Post Office Department cannot open mail without warrant to enforce postal regulations) *with Walter v. United States*, 447 U.S. 649, 656 (1980) (private carrier can open packages without violating Fourth Amendment).

to be present during the searches. Record Expando File, Friday Deposition at 37.

The searches at issue here were not a part of the normal operation of the hospital. Rather they were part of an extraordinary investigation of Ortega. A special committee which included a member of the hospital's police force was appointed to conduct this investigation. The investigation was not a routine review, but instead related to extraordinary charges against Ortega which resulted in Ortega's removal from his position and might have resulted in criminal charges against Ortega.

Finally, the routine types of intrusions into an employee's private office cited by Petitioners cannot be compared to the extraordinary intrusions at issue here. The scope of the searches distinguishes them from the normal intrusions which form a necessary part of the collective enterprise of operating a public hospital. The sanitized language used by Petitioners to describe the searches—labeling them an "inventory," Brief for Petitioners at 8 n.5—cannot disguise their extreme intrusiveness. Petitioners entered Ortega's locked office in his absence and literally inspected every item in that office, including those contained in his desk and file cabinet.[8] A member

---

[8] In contrast is the procedure followed in *Chocallo*, 548 F.Supp. 1349. In that case, a hearing officer refused to release a file after an appellate body reversed her decision and directed that the case be transferred. As a result:

> According to Ennis, he obtained the key to the office from Kuriger, the Regional Chief ALJ's secretary, who kept office keys, then unlocked and opened the door in the presence of the above named witnesses. Ennis gave Kuriger *instructions to enter the office and to make a visual inspection* of plaintiff's desk and table for the Taylor file, *but not to open any drawers or file cabinets.* While the witnesses remained outside the open door and observed, Kuriger entered and made a visual inspection. According to Ennis, she followed these directions to the letter, *spending two or three minutes looking* but not locating the file, and *then exiting the office without touching, disturbing,*

of the hospital's police force spent several hours in Ortega's office on more than seven days. III Record Tab 30, Stratton Deposition at 52-53. Protecting public employees from such extraordinarily intrusive searches will not unduly impair the efficiency of public administration.

Petitioners, like so many public employers charged with violating the Constitution, cite to this Court its words in *Bishop v. Wood*, 426 U.S. 341 (1976), "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349. But the Court of Appeals' holding in no way suggests or mandates such a result. The extraordinary searches at issue were not among the "multitude of personnel decisions" that the federal courts might justifiably decline to scrutinize. The extraordinary nature and extreme intrusiveness of the searches places this case squarely within the protection of the Fourth Amendment. And "the federal courts are the appropriate forum for ensuring that the constitutional mandates . . . are followed by those agencies of government making personnel decisions that pervasively influence the lives of those affected thereby." *Id.* at 354 (Brennan, J., dissenting).

B. *The Searches Violated All Standards Of Reasonableness Yet Established Under The Fourth Amendment*

Even if the warrant requirement did not apply in this context, the searches at issue violated all standards of reasonableness yet established under the Fourth Amendment. "[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." *Mincey*, 437 U.S. at 393 (quoting *Terry*, 392 U.S. at 25-26)). The only exigency which even arguably justified

---

or removing any item from the office. Ennis then closed and locked the door in the presence of the same witnesses.

Id. at 1363 (emphasis added).

these searches was a belief that Ortega had removed a computer believed to be hospital property from his office.[9] This belief could have been verified through visual inspection of the interior of the office. But the scope of the searches—including inspection of all items in the office, desk, and file cabinet—far exceeded this limited intrusion. *See Mincey*, 437 U.S. at 393. The searches "as actually conducted" were thus not "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 105 S.Ct. at 744 (quoting *Terry*, 392 U.S. at 20).

The only articulated rationale for the searches was a need to separate State property from Ortega's personal property. J.A. at 64 (Stratton Deposition at 41); *id.* at 50 (Friday Deposition at 21). Even if there had been some urgent need to obtain specific State property or even all State property believed to be in Ortega's office,[10] the scope of the searches was not justified by any such need. In *Davis*, 328 U.S. 582, this Court stated:

> We do not suggest that officers seeking to reclaim government property may proceed lawlessly subject

---

[9] The record reveals, however, that the computer was ordinarily located outside Ortega's office in an open office, that Ortega routinely brought the computer home on weekends, that Ortega notified the hospital the day after he brought the computer home that he had done so, and that the search was not authorized or conducted until after Ortega had so informed his secretary. II Record Tab 27, Ortega Declaration ¶¶ 9, 10, Exhibit I. Petitioners O'Connor and Friday both admitted that concern about the computer did not motivate the searches. J.A. a 39 (O'Connor Deposition at 44); Record Expando File, Friday Deposition at 44-45. O'Connor testified that he became aware that the computer was missing when Ortega called his secretary and informed her that he had the computer at his home. J.A. at 36 (O'Connor Deposition at 34).

[10] The record reveals that the principal public records utilized by Ortega as Chief of Professional Education—residents' files—were stored not in Ortega's office, but outside his office in his secretary's office. J.A. at 14 (Ortega Declaration ¶ 5); *id.* at 21 (Ciraulo Declaration ¶ 5).

> to no restraints, nor do we suggest that the right to inspect [for government property] subjects a dealer to a general search of his papers for the purpose of learning whether he has any government property subject to inspection or seizure.

Id. at 591.

The hospital police officer who conducted the searches acknowledged that after less than one hour in the office, he realized he was unable to separate state property from personal property. III Record Tab 30, Stratton Deposition at 7-8, 51. No State property of any kind was segregated or utilized in any manner. The searches continued, however, for several hours on each of more than seven days. *Id.* at 53. Petitioners continued to search Ortega's office, reviewing all items in the office, despite the fact that they had abandoned their original stated objective of securing State property.

C. *The Standard Proposed By Petitioners Would Wholly Deprive Public Employees Of Fourth Amendment Protection*

The standard proposed by Petitioners would wholly eviscerate the protection of the Fourth Amendment. Petitioners suggest that the search of a public employee's office "be deemed reasonable if conducted for work-related concerns." Brief for Petitioners at 24. This standard would allow public employers to invade the privacy of their employees *to any degree* so long as the invasion was somehow related to the employer's function. For example, this standard would countenance a university administration's routine or selective search of professors' offices to determine how much research they had conducted. Petitioners' suggestion would allow the states to seek their ends by any means. The protections of the Bill of Rights were adopted precisely to avoid such a result.

Such a derogation of the protections of the Fourth Amendment is not justified in the context of public em-

ployment. In *T.L.O.*, 105 S.Ct. 773, this Court took notice of the "disorder" in public schools, involving "drug use and violent crime." *Id.* at 742. This Court also found that the preservation of order in schools "requires close supervision of school children" and "swift and informal . . . procedures." *Id.* at 742, 743. These findings led this Court to conclude "that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 743. These factors do not exist in this case nor justify a similar easing of restrictions in the setting of public employment.

Responsible public officials—doctors, lawyers, professors, policemen, and judges—are not schoolchildren. They do not require "close supervision." Civil servants must exercise discretion and act autonomously and these functions require privacy. Civil service laws exist in every state precisely to prevent "swift and informal . . . procedures." The independence of public employees is critical to their faithful performance of their duties as well as to the attraction of qualified candidates into the civil service. The protections of the Fourth Amendment complement the goals of civil service reform and promote the efficiency and independence of public servants. This Court should not allow the states to defeat these objectives by infringing the Fourth Amendment freedoms of their employees.

CONCLUSION

For all the above-stated reasons, the American Federation of State, County and Municipal Employees, AFL-CIO respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD KIRSCHNER
Counsel of Record
CRAIG BECKER
KIRSCHNER, WEINBERG & DEMPSEY
1615 L Street, N.W., #1360
Washington, D.C. 20036
(202) 775-5900
Counsel for American Federation of State, County and Municipal Employees, AFL-CIO